86-314

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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BARBARA ANN ALLEY
and
W.H. ALLEY,

Petitioners,

vs.

GUBSER DEVELOPMENT COMPANY,
NATIONAL GYPSUM COMPANY, and
WEYERHAUSER COMPANY,

Respondents.

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# PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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DATED: July 26, 1986

## QUESTION PRESENTED

1. Can Plaintiffs in federal court accept a remittitur of punitive damages, then cross-appeal separate and distinct causes of action?

## PARTIES BELOW

Petitioners, Barbara Ann Alley and William H. Alley - the plaintiffs-appellees and cross-appellants in the court below - are residents of Colorado.

Respondents, Gubser Development Company, National Gypsum Company, and Weyerhaeuser Company - defendants-appellants and cross-appellees in the court below - are corporations with their

principal places of busines in Oklahoma, Kansas and New York respectively and doing business in Oklahoma.

National Gypsum Company does business in Newton, Kansas as Diversified Manufactured Housing. Gubser Development Company does business in Oklahoma as Best Mobile Homes.

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BARBARA ANN ALLEY and W.H. ALLEY,

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**PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

Barbara Ann Alley and W.H. Alley, Petitioners, pray that the Supreme Court grant a writ of certiorai to review the judgment of the Tenth Circuit Court of Appeals entered on May 28, 1986. The Tenth Circuit reversed for insufficiency of the evidence the award of punitive damages already remitted by the trial court and dismissed the petitioners' cross-appeal of issues separate and distinct from the punitive or compensatory damages issues submitted to the jury.

## OPINIONS BELOW

The August 10, 1983 Findings of Fact and Conclusions of Law of the United States District Court of Colorado reported at 569 F.Supp. 36 (D.C. Colo. 1983) is reproduced and appended hereto as Appendix "A".

The March 3, 1986 Opinion of the United States Court of Appeals for the Tenth Circuit is reproduced and appended hereto as Appendix "B".

The May 29, 1986 Denial of Motion for Rehearing by the United States Court of Appeals for the Tenth Circuit is reproduced and appended hereto as Appendix "C".

## JURISDICTION

Petitioners seek review of the judgment of the Tenth Circuit Court of Appeals entered March 3, 1986 reversing the award of punitive damages entered on August 31, 1982 and denying petitioners' cross appeal of separate controversies. The Tenth Circuit denied a timely filed Motion for Re-Hearing on May 28, 1986. This petition is filed within 90 days of the Court of Appeals' Denial of Re-Hearing, and jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

## CONSITUTIONAL PROVISIONS, ACTS AND STATUTES INVOLVED

United States Constitution, Fifth and Seventh Amendments; The Magnuson-Moss Warranty Act, 15 U.S.C. §2301, et seq.; Colorado State Constitution Article II, 8,

25; Pre and Post Judgment Colorado Interest Statutes; C.R.S. §13-21-101 (1978); and C.R.S. §13-21-102 (1979).

## STATEMENT OF THE CASE

William H. and Barbara Ann Alley commenced this action against Weyerhaeuser Company, National Gypsuym Company and Gubser Development Company on July 25, 1980. (R.O.A. p.1). The jurisdiction of the district court was invoked under 28 U.S.C. §1332 because of diversity of citizenship, the plaintiffs being citizens of Colorado and defendant Gubser Development Company being a citizen of Oklahoma, defendant National Gypsum Company being a citizen of Kansas and defendant Weyerhaeuser being a citizen of Washington. The Alleys claimed damages for personal injuries and property loss as a result of exposure to formaldehyde gas in

a new "American" mobile home manufactured by National Gypsum Company, d/b/a Diversified Manufactured Housing (DMH) in Newton, Kansas. (R.O.A. p.1). After considerable shopping for a mobile home in which they could live in their retirement years, the Alleys were shown by Best Mobile Homes an "American" home which did not smell. (Tr. p.199). They ordered the same model from Gubser Development Company, an Oklahoma corporation d/b/a Best Mobile Homes. (R.O.A. p.1; Tr. pp.199-200). The purchase included a full one-year written warranty "on all". (Plaintiffs' Exhibit 2).

When the Alleys moved into the home, a sickening formaldehyde odor burned their eyes, noses and throats. (Tr. pp.210, 689). The seller "Best" advised them it was the dye in the rugs, the odor would go away, and they should not worry. (Tr.

p.210). The problem persisted and their complaints were ignored. (Tr. pp.214-215). The Alleys were later told by a "Best" manager that it was common knowledge in the industry that the chemical smell was formaldehyde. (Tr. p.215).

The Alleys called the Health Department in Tulsa, Oklahoma, the EPA and other agencies for help. (Tr. p.1568). They retained an attorney in Oklahoma who called the manufacturer to ask for help. (Tr. p.223). The manufacturer promised to send a factory representative who never came out. (Tr. pp.1551-1152; 1569-1572).

Mr. Alley became sick from what was later diagnosed as toxic hepatitis. (Tr. p.794). As he felt better when visiting his children in Colorado, they decided to move the home there where the weather was cooler and the home could be left open to

the air. (Tr. p.671). In Colorado, the State Health Department measured levels of formaldehyde in the home at .99 parts per million, six months after the purchase. Given the high temperature and humidity in Oklahoma, much formaldehyde had already escaped. (Tr. p.275). The Colorado Attorney General's Office wrote the manufacturer and seller asking for relief. (Tr. p.1568-1569). Gubser Development, the manufacturer, discussed the formaldehyde problem with Weyerhaeuser Company, the supplier of the particle board decking and manufacturer of the wall paneling which released formaldehyde. (Tr. p.1568-72). National Gypsum then offered only a deodorant mask. (Tr. p.215).

Mr. Alley could not work and fell behind in his house payments. (Tr. p.1790). The purchase note was accel-

lerated, demand for payment was made, and the Alleys sought bankruptcy. (Tr. pp.247, 249, 1234).

The Alleys introduced evidence at trial which showed that National Gypsum Company and Weyerhaeuser Company knew that their products released formaldehyde which could render a home uninhabitable. (Tr. p.1514, Plaintiffs Exhibit 331). Nonetheless, they took no action to help the Alleys even after notice. (Tr. p.1568-72).

Prior to trial the court dismissed the Alleys' claim to attorney's fees under the Magnuson-Moss Warranty Act, 15 U.S.C. §23-10(d)(1), based on an erroneous finding that the Alleys did not have any property damage. (Tr. Vol. 1450). In Boelens v. Redman Homes, Inc., 748 F.2d 1058 (5th Cir. 1984) the Fifth Circuit

Court of Appeals held that the loss of mobile home due to formaldehyde odor is property damage.

The jury found for the Alleys on their claims of strict liability, negligence and breach of warranty and awarded Mr. Alley $30,000.00 compensatory and $510,000.00 punitive damages and Mrs. Alley $20,000.00 compensatory damages. (Tr. p.2028). The trial court ordered a remittitur of Mr. Alley's punitive damages from $510,000.00 to $150,000.00, or, alternatively, a new trial on all issues. (R.O.A. p.763-770). The court disallowed the Alley's motion for pre-judgment interest. The Alleys accepted the remittitur under protest. (R.O.A. p.784).

The defendant corporations, Gubser Development and Wyerhaeuser appealed the punitive damage award to the Tenth Circuit

Court of Appeals, which reversed the punitive damage award for insufficiency of evidence. The Alleys tried to cross-appeal the separate controversies of whether they were entitled to attorney's fees under the Magnuson-Moss Act and interest under state law. The Court of Appeals disallowed their cross-appeal of these controversies, holding that the principles stated in Donovan precluded a cross-appeal where plaintiffs were given the choice of accepting the remittitur or a new trial on all issues. This was error. Call Carl, Inc. v. B.P. Oil Corp., 554 F.2d 623 (4th Cir. 1977).

## REASONS FOR GRANTING THE WRIT

This petition presents a basic question of federal jurisdiction, whether a remittitur plaintiff can cross-appeal causes of action separate and distinct

from the order of remittitur. Petitioners urge the Supreme Court to exercise its power of supervision in this case to reverse an unwarranted departure by the Tenth Circuit Court of Appeals from the usual course of allowing plaintiffs to appeal separate controversies in remittitur appeals. Call Carl, Inc. v. B.P. Oil Corp., 554 F.2d 623 (4th Cir. 1977).

By foreclosing the Alley's chance to seek reinstatement of claims for statutory attorney's fees and interest, issues which are severable from remitted punitive damages, the Tenth Circuit placed itself in direct conflict with all other circuits which have confronted this issue. Call Carl, Inc. v. B.P. Oil Corp., 554 F.2d 623 (4th Cir. 1977), cert. den. 434 U.S. 923 (1977) (allowed cross-appeal of dismissal of Sherman Act claims after remittitur of

award under claims of fraud and deceit); Baltezore v. Concordia Parish Sheriff's Department, 767 F.2d 202 (5th Cir. 1985) (allowed cross-appeal of dismissal of negligence claim after remittitur of award under wrongful death claim); Ohio-Sealy Mattress Manufacturing Company v. Sealy Incorporated, 585 F.2d 821 (7th Cir. 1978) (allowed cross-appeal of dismissal of claim for injunctive relief after remittitur of award under the damages claim); Aaro, Inc. v. Daewood International Corp, 755 F.2d 1398 (11th Cir. 1985) (allowed cross-appeal of dismissal of claims for certain business expenses and commissions after remittitur of award under claims for other business expenses and commissions).

The general rule accepted in these circuits is stated in Call Carl, Inc. v. B.P. Oil Corp., 554 F.2d 623, 630 (4th Cir. 1977).

> Plaintiff's action in accepting a remittitur to avoid a new trial on fraud and deceit damages [does not] indicate as a matter of law their assent to a directed verdict entered against them on the anti-trust account of their complaint. We therefore conclude that plaintiffs are entitled to maintain this appeal on the anti-trust count, but not as to the correctness of the remittitur.

The Tenth Circuit Court of Appeals disallowed the Alley's cross-appeal based on a misapplication of this court's holding in Donovan v. Penn Shipping Co., 429 U.S. 648 (1977). In Donovan this Court reaffirmed a holding that a plaintff in federal court may not directly appeal from a remittitur which he has accepted.

The Donovan rule merely precludes a plaintiff's appeal of a remittitur order which he has accepted. The plaintiff can appeal from separate orders, hence the Donovan rule is inapplicable to plaintiff's appeal the dismissal of claims which were not submitted to the jury and were therefore not subject to the remittitur order. Aaro, Inc. v. Daewood International Corp., 755 F.2d 1398 (11th Cir. 1985) citing 6 A.J. Moore, J. Lucas, and G. Grotheer, Jr., Moore's Federal Practice, §59.08[7] (2nd Ed. 1984).

The circumstances in this case are identical to those in G.M. Brod & Co. v. U.S. Home Corp, 759 F.2d 1526 (11th Cir. 1985), in which the Eleventh Circuit allowed without comment plaintiff's cross-appeal of the separate issue of

pre-judgment interest after accepting a remittitur. See generally, Price v. Franklin, 574 F.2d 594 (D.C. Cir. 1978).

The Tenth Circuit expanded the court's remittitur order to include all of the separate controversies in this case because "... the district court ruled as follows with respect to the remittitur.... 'If plaintiffs choose to reject the remittitur, a new trial will be ordered on all issues, ...' (Emphasis added)." Appendix B at 29. This relief is, of course, available in any new trial

The Alleys, however, were not appealing punitive damages or their underlying compensatory claims. Rather, they sought by cross-appeal to address controversies separate from the issues submitted to the finder of fact. Separate controversies are defined as issues which

are so distinct and separate from others that a re-trial of those alone may be had without injustice. Gasoline Products Company v. Champlin Refining Company, 283 U.S. 494 (1931). The jury's finding of liability under the breach of warranty claim was not appealed, thus the issue of whether the defendants are liable under the Magnuson-Moss Warranty Act provisions can be decided based on the appellate record or can be re-tried alone.

The cross appeal of separate controversies establishes fairness by allowing review of claims not submitted to the jury and promotes judicial economy giving both parties reason to settle disputes.

It is important that certiorari be granted in this case to prevent the Tenth Circuit's expansion of a questionable

doctrine, remittitur, a dangerous tool, long criticized for its questionable constitutionality, efficiency and fairness. Dimick v. Scheidt, 293 U.S. 474 (1935) (additur unconstitutional, remittitur begrudgingly approved in dicta becaused of the length of time courts had practiced the procedure); Bonura v. Sea Land Service, Inc., 512 F.2d 671 (5th Cir. 1975) (Goldberg J. dissenting) (denial of rehearing) ("The doctrine of remittitur rests on a constitutional base of clay"); Carlin, Remittitur and Additurs, 49 W.Va.L.Q.1 (1942). In Missouri, the doctrine of remittitur was abolished because it invaded the function of a jury and remittitur cases were appealed despite the finality of the remittitur. Firestone v. Crown Center Redevelopment Corporation, 693 S.W.2d 699 (Mo. banc 1985).

The remittitur practice began with Justice Storey's 1822 circuit court decision where he simply asked for remittitur without authority. Blunt v. Little, 3 F.Cas. 760 (No. 1578) C.C.A. Mass. 1822. The policy was established and is intended to bring finality to a judgment. Northern Pac. R.R. v. Herbert, 116 U.S. 642 (1886); Kennon v. Gilmor, 131 U.S. 22 (1889); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41 (1895); Woodworth v. Chesbrough, 244 U.S. 79 (1917).

The practice is complex when put into action, especially because the procedures and standards used by federal courts are not uniform. See generally, Sann, Remittitur Practice in the Federal Courts, 76 Columbia Law Review 299 (1976). This Court has an opportunity with this case to instill uniformity in the practice and

prevent needless expansion of an already groundless principle. Because of the continuing doubts and shaky precedents on which remittitur stands, restraint in unlimited innovation of the remittitur doctrine is urged for protection of the Seventh Amendment right of trial by jury. U.S. Const. amend. VII; 6 A.J. Moore, Federal Practice, §59.05(3) (2d Ed. 1974).

Traditionally, neither plaintiffs nor defendants were allowed to appeal the remittitur after the plaintiffs had accepted it in lieu of a new trial. Woodsworth v. Chesbrough 244 U.S. 79 (1917) and Koenigsberger v. Richmond Silver Mining Company, 158 U.S. 41, 51 (1985).

The expansion of appellate review led to changes in the availability of remittitur appeals, and eventually the

defendant secured a right to appeal a remittitur. Neese v. Southern Ry., 350 U.S. 77 (1955); Smith v. Welch, 189 F.2d 832 (10th Cir. 1951);

Prior to Donovan, some federal courts permitted an appeal of an order granting a remittitur, based on the rationale that the remittitur is sufficiently adverse to the plaintiff to warrant cross-appeal. See Bonn v. Puerto Rico International Airlines, Inc., 518 F.2d 8990 (1st Cir. 1975). Federal courts had liberalized the traditional rule against plaintiffs' appeal of remittitur. United States v. 1160.96 Acres of Land, 432 F.2d 910 (5th Cir. 1970) (when plaintiff accepted "under protest"); Moaney v. Henderson Portion Pack Co., 334 F.2d 7 (6th Cir. 1964) (remittitur appeal allowed under state law); Thomas v. E.J. Korvette, Inc., 329 F.Supp. 1163, 1171 (E.D. Pa. 1971), rev'd

on other grounds, 476 F.2d 471 (3d. Cir. 1973); contra, Collum v. Butler, 421 F.2d 1257 (7th Cir. 1970) (direct appeal).

In Donovan v. Penn Shipping Co., the Supreme Court finally precluded plaintiffs from directly appealing remittiturs they accepted "under protest". The Donovan decision is based on four early Supreme Court cases, all decided before defendants had a right to appeal an order of remittitur. The first was Kennen v. Gilmer, 131 U.S. 22 (1889), in which the plaintiff was not given a choice of a new trial in lieu of remittitur, the Court stated in dicta that an appeal would be disallowed if the plaintiff had consented to the judgment. In Lewis v. Wilson, 151 U.S. 551 (1894), the plaintiff was not allowed to appeal a remitted judgment two years after signing an acknowledgment of satisfaction. In Koenigsberger v.

Richmond Silver Mining Co., 158 U.S. 41 (1895) and Woodworth v. Chesbrough, 244 U.S. 79 (1977), plaintiffs actively sought the remittitur on appeal, thus the Courts' dismissals of the appeals were premised on the plaintiffs' free election of the remittitur.

The Donovan decision disposed of plaintiffs' right to a direct appeal for review of a remittitur, but is silent regarding plaintiffs' right to cross-appeal when a remittitur is appealed by a defendant. Since Donovan, courts extended without basis the prohibition against direct appeal a remittitur by plaintiffs to include cross-appeals. Westerman v. Sears, Robuck & Co., 577 F.2d 873 (1978).

In pre-Donovan remittitur cases, plaintiff appeals offered an appropriate counter-balance to remittitur appeals by

defendants. Without plaintiffs' cross-appeal, a significant procedural advantage is extended to the defendant, a change which threatens to undermine the fundamental fairness of the remittitur doctrine. Note, Procedures to Lessen Remittiturs' Intrusion on the Seventh Amendment Right to Jury Trial, 1979 Wash.U.L.Q. 639 (1979).

In this case, the Tenth Circuit went even further and created a completely risk-free appeal in which defendants receive the benefit of the remittitur and can appeal without jeopardy of separate controversies. This is very attractive to defendants and actively encourages appeal, enlarging the burden on the appellate courts. See Akermonis v. Sea-Land Service, Inc., 688 F.2d 898 (2nd Cir. 1982).

The federal appellate civil caseload has doubled three times since their early years of operation at a rate which is greatly disproportionate to the rate of increase in caseloads at the trial level. Carrington, Crowded Dockets and the Courts of Appeals; The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542 (1969). This increased burden impedes the appellate functions of judicial review, institutionalization of decisions and creating a stable body of national law, thus restraint is necessary. Carrington supra at 555. The appellate court crises may be relieved by restraint of the remittitur.

## CONCLUSION

A remittitur plaintiff's right to appeal separate controversies advancces a significant goal of judicial economy and

limits the unconstitution impact of the remittitur's intrusion on the jury function. The Tenth Circuit's expansion of the Donovan principle threatens to undermine the effectiveness of the appeal process in mitigating negative impact of remittitur by allowing defendnats a risk-free unopposed appeal of remittitur.

For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

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